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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

May 20, 1986

MEMORANDUM

SUBJECT: In re ARRCOM INC.

FROM: Lloyd S. Guerci, Director
RCRA Enforcement Division

TO: RCRA Enforcement Branch Chiefs, Regions I-X
Associate Regional Counsels - Waste, Regions I-X

Enclosed is a decision holding that absentee owners with no involvement in the operation of a business are subject to liability for RCRA violations.

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
ARRCOM, INC., DREXLER ENTERPRISES, INC., et al.,	)	RCRA (3008) Appeal No. 86-6
	)	
Respondents.	)	
	)	
Docket Nos. X83-04-01-3008 & X83-04-02-3008	)	
	)	

FINAL DECISION

Introduction.

This is a proceeding against the owners and operators of commercial property in Tacoma, Washington, who have been charged with maintaining a hazardous waste management facility without complying with Section 3005 of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. 6925, and 40 CFR Part 265, Subparts A and B, and Section 270.1. EPA Region X filed a Complaint and Compliance Order on May 10, 1983. 1/ It filed a First Amended Complaint and Compliance Order on April 3, 1985. The Regional Administrator charged the respondents with maintaining a facility at 930 C Street in Tacoma, Washington, for the storage of waste oil, used oil, spent

1/ This is a consolidated proceeding also involving a complaint filed against a facility in Rathdrum, Idaho on April 27, 1983. No appeal was taken from that decision.

solvents and listed hazardous wastes without obtaining a RCRA permit. The Amended Complaint assessed a civil penalty of $13,500 and ordered closure of the facility.[2/]

A hearing was held April 30, 1985. Administrative Law Judge Yost issued a decision on October 21, 1985, ruling that the operators of the facility were liable for civil penalties for failing to obtain a RCRA permit and that they were also liable to perform closure activities. However, Judge Yost ruled that the owners of the facility did not have a duty under RCRA to comply with hazardous waste permitting requirements because they had no involvement in the operation of the business. Judge Yost held that the owners were not liable either for civil penalties or for ensuring that appropriate closure procedures were followed.

The Region has appealed,[3/] taking the position that the owners/lessors of the facility shared joint and several liability with the operators of the facility for RCRA violations. The Region has further contended that the Administrative Law Judge erred in revising and reissuing the Regional Administrator's compliance order, rather than issuing a declaratory decision

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2/ In its Amended Complaint, the Regional Administrator reduced the civil penalty from $22,000 to $13,500 in light of EPA's draft RCRA Civil Penalty Policy, the final version of which was issued May 8, 1984. Judge Yost further reduced the penalty to $3,000. The Amended Complaint also added Ronald Inman as a respondent and deleted David Drexler.

3/ The Region filed its appeal November 21, 1985.

and remanding the case to enable the Regional Administrator to reissue his order.

The Chief Judicial Officer has been delegated authority by the Administrator to decide this appeal pursuant to 40 CFR §22.30 (1984). For the reasons set forth below, the Initial Decision is affirmed in part and reversed in part.

Statement of Facts

The facility at issue here, located at 1930 C Street in Tacoma, Washington, was used beginning in August 1981 for a business involving the storage and resale of used oil and solvents. Richard Cragle and Ronald Inman are the owners and lessors of the property. George W. Drexler and his son Terry were the operators of the facility. The Drexlers have conducted business at 1930 C Street as well as other business ventures using a number of corporate entities. 3/ George Drexler is the president of Arrcom, Inc. and Drexler Enterprises, Inc. He also owned the Empire Refining Company. Terry Drexler is the president of Terry Drexler, Inc., doing business as Golden Penn Oil Company and Western Pacific Vacuum Service. Initially, Empire Refining Co., a corporation controlled by George Drexler, leased the C Street facility from the owners of the property. 4/ Drexler, Arrcom, Inc. and Drexler Enterprises, Inc. used the

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3/ Judge Yost has ruled that the corporations created by George and Terry Drexler were practically and legally inseparable from the individuals who controlled them.

4/ Although no written lease was submitted in evidence, Judge Yost has determined that such a transaction occurred.

facility for the storage of used oil and solvents. Empire subsequently sublet the facility to one or more of the business enterprises conducted by Terry Drexler. For simplicity, the Administrative Law Judge referred to all of George Drexler's corporate entities as Arrcom, Inc. and I will do the same. 5/

Arrcom began using the C Street facility to store used oil and other material, including spent solvents, in August 1981. The storage on the premises of spent solvents that are listed hazardous wastes caused the facility to be subject to the reporting and permitting requirements of RCRA. Section 3010 of RCRA, 42 U.S.C. § 6930, obligates persons handling hazardous waste to notify EPA of their activities no later than 90 days after the waste is first classified as hazardous. Section 3005(a) of the statute, 42 U.S.C. §6925(a), requires a federal permit for the treatment, storage or disposal of hazardous waste. The statute requires EPA to promulgate regulations implementing its requirements, identifying and defining hazardous wastes by particular substances or characteristics, 6/ and establishing standards for hazardous waste storage, treatment and disposal facilities. 7/ RCRA Section 3008, 42 U.S.C. § 6928, authorizes EPA to seek civil penalties for its violation and to require compliance.

5/ The Drexlers argued during the proceeding below that some of these business entities lacked responsibility for the activities of the others. However, the Administrative Law Judge ruled against them, and these matters have not been raised on appeal.

6/ 42 U.S.C. § 6921(b). EPA has promulgated such regulations at 40 CFR § 261.1-33.

7/ 42 U.S.C. §§ 6922, 6923, 6924

On December 3, 1981, George Drexler informed Linda Dawson, an EPA employee, that the property was being used for the storage of used oil and solvents. In response, EPA requested that Arrcom submit a Notification of Hazardous Waste Activity. Arrcom's Notification was received by EPA on January 6, 1982. It stated that the facility handled used oil and organic spent solvents. Arrcom also submitted a Part A application for a hazardous waste permit, which was received by EPA on the same date. However, the Part A application was rejected by EPA as incomplete. In a letter to Arrcom dated January 11, 1982, EPA identified the deficiencies in the form and requested that the completed form be returned to the Agency. Among other deficiencies, the form had not been signed by the owner of the facility.

Subsequent to the exchange of correspondence between EPA and Arrcom, Arrcom sublet the facility to Terry Drexler and Terry Drexler, Inc., who thereafter continued use of the premises for the storage of used oil and spent solvents. According to EPA records, EPA has not received a completed Part A or Part B application form for a permit for the facility at 1930 C Street nor has it received a closure plan for the facility.

On June 9 and July 15, 1982, the Washington Department of Ecology and EPA jointly conducted an inspection of the 1930 C Street facility and verified the presence of several chemicals listed as hazardous waste. Thereafter, Region X initiated this enforcement proceeding, charging respondents with operating a hazardous waste facility without a Part B permit as required

by Section 3005(a) of the Act and 40 CFR 122.22(b)[recodified on April 1, 1983 at 40 CFR 270.10(f)].[8/] The accompanying Compliance Order provided that respondents shall not accept hazardous waste for disposal at the C Street facility; that respondents shall not accept hazardous waste for storage or treatment at the facility until EPA has issued a permit for the facility; and that respondents shall submit a closure plan under 40 CFR Subpart G within 30 days of the receipt of the order.

Discussion.

a) Duty of Facility Owner to Comply With RCRA

In his Initial Decision of October 21, 1985, Judge Yost ruled that the operators of the facility had violated RCRA and that they were liable to perform appropriate closure activities; however, Judge Yost determined that the owners of the facility, Cragle and Inman, had not violated RCRA because they were "arms-length" lessors with no involvement in the operation of the business. It is my judgment that RCRA does impose liability on Messrs. Cragle and Inman as owners of a non-complying hazardous waste facility. Accordingly, I reverse the decision below to the extent that it is inconsistent with that conclusion.

8/ Since the facility became operational after November 19, 1980, it was not entitled to "interim status." RCRA permits hazardous waste facilities that were in existence prior to November 19, 1980, to operate on an interim status pending the issuance of a RCRA permit.

RCRA was enacted to provide comprehensive federal regulation of hazardous wastes from generation to disposal. United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984). Congress intended the statute to have a broad reach. The Preamble to the Act recognized that inadequate controls of the management of hazardous waste may subject the public and the environment to unwarranted risks. 42 U.S.C. 6901(b)(5). Congress clearly intended to hold both owners and operators of hazardous waste management facilities responsible for compliance with RCRA requirements. As H.R. Rep. No. 94-1491 expressly stated:

> [it] is the intent of the Committee that responsibility for complying with the regulations pertaining to hazardous waste facilities rest equally with owners and operators of hazardous waste treatment, storage or disposal sites and facilities where the owner is not the operator. H.R. Rep. No. 94-1491, 94th Cong. 2d Sess. 28, 1976 U.S. Code Cong. & Admin. News 6266.

The express language of RCRA reflects this Congressional intent to impose RCRA requirements on both owners and operators of facilities. Section 3004 of RCRA directs the EPA Administrator to promulgate regulations "applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste . . . ." 42 U.S.C. § 6924 (emphasis added). It authorizes the Administrator to establish specific regulatory requirements relating to "ownership." 42 U.S.C. § 6925. Section 3005 of RCRA provides, without qualification, that each person owning or operating a facility shall be required to

obtain a RCRA permit. 42 U.S.C. § 6925. Permitting the owners of a facility used for hazardous waste storage to avoid responsibility for the activities conducted there would be contrary to the express intent of Congress and would limit the effectiveness of the statute.

RCRA does not link the duty to obtain a RCRA permit to the extent of the owner's knowledge or control of the facility. In contrast, Congress expressly limited the responsibilities of non-participating owners under another RCRA provision, Section 3013, which authorizes the Administrator to require a facility owner or operator to conduct certain monitoring, testing, analysis and reporting. Specifically, section 3013(b) provides that the Administrator may require the performance of such duties by a previous owner or operator if the Administrator finds that the current owner could not be reasonably expected to have actual knowledge of the presence of hazardous waste at the site. Congress could have used similar language in section 3005 to shield non-participating owners from RCRA's permit requirements had it so intended.

EPA gave effect to the intent of Congress when it promulgated regulations to implement RCRA. In its Preamble to the May 19, 1980 Federal Register Notice issuing regulations to implement RCRA, the Agency stated that:

> The Agency's first priority is to protect human health and the environment. Thus, where there has been a default on any of the regulatory provisions, the Agency will attempt to gain compliance as quickly as possible. In so doing, the Agency may bring

> enforcement action against either the owner or operator or both. EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements . . . . Hazardous Waste and Consolidated Permit Regulations, 45 Fed. Reg. 33169 (1980).

EPA explained its reasons at length in the Preamble. It noted that:

> [s]ome facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility. 45 Fed. Reg. 33169 (1980).

Congress took a similar approach under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., holding non-participating property owners liable for contributing to the cost of cleanup of hazardous waste sites. The Regional Administrator has cited several federal court decisions construing CERCLA as lending support to his interpretation of RCRA. See, e.g., United States v. Argent, 21 ERC 1354 (D.N.M. 1984). Although these cases involve a different statute, they do provide an example of similar Congressional intent and action under analogous circumstances.

Based on the statutory language and EPA's implementing regulations, I have determined that the owner of a facility at

which hazardous waste is stored is subject to RCRA and may be held accountable for its violation.[9/] Therefore, Region X acted within its authority in charging respondents Inman and Cragle for RCRA violations at 1930 C Street and assessing civil penalties against them.

Despite provisions in both RCRA and the RCRA regulations that appear to me clearly to impose liability on facility owners, Judge Yost decided that the owners of the 1930 C Street facility were not liable for RCRA violations. I have carefully considered Judge Yost's views on this issue but do not find them persuasive.

Judge Yost acknowledged that:

> [i]t is true . . . that the congressional discussion associated with this Bill indicates that it was Congress' intent to impose liability on owners who are not also the operators of RCRA facilities. Initial Decision at 25.

He added: "I do not believe, however, that it intended the result herein urged by the Agency." Initial Decision at 25. He expressed concern that an absentee owner may not have been alerted to the nature of the activities on his property.

9/ Region 10 filed a motion, dated February 27, 1986, requesting that I consider Administrative Law Judge Gerald Harwood's decision in In the Matter of Aero Plating Works, Inc., RCRA Docket No. V-W-84-R-071-P, holding that owners and operators of hazardous waste facilities are jointly and severally responsible for RCRA permit requirements. Since I received the Region's motion and supporting memorandum after this segment of my decision was written, it is not necessary to rule on the motion. Judge Harwood's decision was not appealed or reviewed sua sponte; it became the Agency's final decision by operation of 40 CFR §22.27(c) on April 4, 1986.

Judge Yost distinguished the CERCLA cases, stating that the reasons for charging an owner with clean-up costs under CERCLA do not apply to the imposition of liability against an absentee owner under RCRA. He notes that:

> [s]ince in the case of CERCLA, the absent and non-participatory land owner has reaped a benefit by the clean-up accomplished by the Government, it is only fair that he share in the costs involved. Such is clearly not the case here where the land owners, Cragle and Inman, were merely arms-length lessors of a discrete piece of real property and had nothing to do with the operation of the business engaged in by the Drexlers. Initial Decision at 9.

Judge Yost stated that EPA could impose liability on an owner only if the owner had incurred vicarious liability as a result of his relationship with the facility operator, based on common law principles of agency or tort law; however, he concluded that neither owner in this instance had a sufficient connection with the hazardous waste operation to be held vicariously liable.[10/] Judge Yost stated that he found persuasive the language of the D.C. Circuit Court in Amoco Oil Company v. EPA, 543 F.2d 270 (D.C. Cir. 1976), a case involving regulations issued under the Clean Air Act Section 211(c)(1)(B)[11/] for the protection of catalytic converter emission control devices. The Court held that a gasoline refiner who leased real estate and equipment to a retail gasoline station was not liable under

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10/ Region X disagreed with Judge Yost's factual determination that the relationship between Cragle and Inman and their lessers provided an insufficient basis for vicarious liability, but has not sought review of this determination.

11/ 42 U.S.C. § 1857f-6(c)(1)(B)(1970).

the Clean Air Act for sales of contaminated gasoline by the gasoline retailer.

In my view, the statute and facts on which the Amoco decision was based are readily distinguishable from those at issue here. Section 211(c)(1)(B) of the Clean Air Act authorized the Administrator to issue regulations controlling the sale of motor fuel and fuel additives. The regulations at issue provided that a gasoline refiner whose name appears at the retail gasoline outlet shall be liable for negligent contamination of gasoline by the retailer with certain exceptions. 40 CFR § 80.23(a)(1). The district court held that EPA lacked statutory authority under the Clean Air Act to impose broad responsibility on refiner-owners of gasoline stations for the conduct of retailers. Lacking such statutory authority, the court considered whether other legal principles might justify imposition of such responsibility on these non-participating owners.

The D.C. Circuit Court held in the Amoco case that a landlord is not generally responsible for the actions of his tenant unless the common law landlord tenant relationship has been altered by statute. The Court said that:

> [t]he authority given to the EPA by Congress [in the Clean Air Act] did not vest the EPA with power to supplant those rules [of tort law] with the doctrine of strict liability.
>
> There is a well defined body of law which determines when negligence may be imputed from one party to another and it is therefore to this law that we must look to judge the legality of the EPA's new liability regulations. 543 F.2d at 275-6. (Emphasis added.)

It added:

> . . . if Congress wants to impose such liability without fault, it can be authorized in a proper way; but Congress has not done so in the existing act. Footnote 13, 543 F.2d at 275.

Judge Skelly Wright dissented, stating that "one may scan the Clean Air Act is vain for any hint that Congress meant EPA to take such a crabbed view of its role." Footnote 12, 543 F.2d at 283-84. Judge Wright stated that vicarious liability may be imposed where the legislature has determined that "such an allocation of responsibility will serve society's ends." 543 F.2d at 281.

It is my judgment that Congress did intend to vest EPA with such authority under RCRA. The statute expressly directs EPA to hold property owners responsible for hazardous waste activities conducted on their property. It spells out no exceptions. The fact that RCRA may have "caught the Drexlers unaware" because of their lack of familiarity with federal regulation of the hazardous waste industry is no defense.

(b) Administrative Law Judge's Authority to Issue Compliance Order

The Region further contends that Judge Yost exceeded his authority when he revised and reissued a Compliance Order against respondents. It is the Region's position that the Administrative Law Judge may not issue a Compliance Order but may only issue a declaratory determination as to the validity of the Regional Administrator's Order. After giving careful consideration to the Regional Administrator's views on this

issue, I have decided that Judge Yost has not exceeded his authority.

The Region claims that the Administrative Law Judge has power under RCRA and the APA only to issue money (i.e., civil penalty) adjudicative orders and cannot adjudicatively order specific relief. It draws a distinction between the penalty assessment in the complaint and the "in personam directives or 'compliance order' aspects" of the process issued by the Regional Administrator. Complainant's Proposed Findings of Fact, Conclusions of Law, and Supporting Memorandum, received July 8, 1985, at 48-49; Memorandum in Support of Appeal, November 21, 1985.

Region X acknowledges that the Administrative Law Judge adjudicates the penalty claim and enters an adjudicatory order pursuant to 5 U.S.C. 554, 556 and the Agency's procedural regulations at 40 CFR Part 22. However, the Region takes the position that 40 CFR Part 22 only governs hearing procedures on the "complaint" aspect of the proceeding; it does not control the disposition of the "compliance order" aspect of the proceeding. The Region does not object to the substance of Judge Yost's compliance order. Its objections are entirely procedural and are focused solely on the decision-making process, not on the Arrcom facts.

Judge Yost's decision-making authority in RCRA cases is governed by the statute and implementing regulations, the Administrative Procedure Act and any express delegations of

authority from the Administrator. I can find no basis in any of them for the distinction that Region X attempts to draw between the compliance and civil penalty aspects of this proceeding.

Section 3008(a) of RCRA provides that:

> the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both . . . . 42 U.S.C. 6928(a).

Section 3008(b) provides that the Administrator shall conduct a public hearing upon the request of any person or persons named in such an order. The Administrator's authority to conduct Section 3008(b) hearings on RCRA violations has been delegated to the Agency's Administrative Law Judges.

The Agency's Consolidated Rules of Practice expressly apply to "adjudicatory proceedings for . . . [t]he issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Solid Waste Disposal Act as amended (42 U.S.C. 6728)." 40 CFR §22.01(a)(4) (emphasis added). Pursuant to these Rules, the presiding officer at the hearing has the authority to adjudicate all issues therein [12/] and to issue an Initial Decision which shall include "a recommended civil penalty assessment, if appropriate, and a proposed final order." [13/] Delegation 1-37 of the Agency's Delegations Manual

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12/ 40 CFR §22.04(c).

13/ 40 CFR § 22.27. The Initial Decision becomes the final order of the Administator if it is not appealed by a party to the proceedings and if the Administrator does not elect to review it sua sponte.

confirms that the Administrative Law Judges shall "hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. 556 and 557."

The exercise of adjudicatory powers in this situation is consistent with the Administrative Procedure Act, which defines agency adjudication to mean "agency process for the formulation of an order" and defines an "order" to include "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form . . . ." 5 U.S.C. § 557.

The role of the presiding officer in an administrative proceeding is discussed at length in Louisville Gas and Electric Company Trimble County Power Plant, NPDES Appeal No. 81-3 (decided September 24, 1981):

> In a conventional NPDES proceeding, the hearing serves as a forum for interested persons, including the permit applicant, to contest the terms and conditions of the permit. In such a proceeding the presiding officer is expected to make and, in fact, does make independent or de novo determinations regarding the terms and conditions of the permit based upon the evidence adduced at the hearing. . . .
>
> In short, it is clear that the presiding officer is empowered to make decisions for the Agency. Therefore, as part of the decisionmaking unit of the Agency, the presiding officer, unlike a reviewing court, is free to substitute his judgment for that of a permit issuer where the facts and circumstances warrant it. Final Decision at 8-9.

The quoted language is equally applicable to the role of the presiding officer in a RCRA compliance hearing.

The Region has cited no provision in RCRA or its implementing regulations to lead me to conclude that Judge Yost may not exercise in this instance the full range of powers customarily exercised by the presiding officer in an administrative proceeding. The Regional Administrator claims that the Administrative Law Judge's issuance of a compliance order contradicts Agency Delegation 8-9-A, which authorizes the Regional Administrator to issue compliance orders. However, Delegation 8-9-A does not state that the authority delegated to Regional Administrators to issue compliance orders shall be exclusive. In fact, the Regional Administrator shares such authority with the Assistant Administrator for Solid Waste and Emergency Response. Moreover, Region X is mistaken in its assertion that the Delegations Manual would control in the event of conflict between the Agency's regulations and a particular delegation. I am not persuaded that such a conflict exists. However, in the event that there were a conflict, and in the absence of other factors, the former would be entitled to greater weight. Agency regulations are issued after publication for public comment and represent the considered judgment of the Agency.

The Region acknowledges that 40 CFR Part 22 "delegates to ALJs all the adjudicative powers the Administrator personally holds . . . ," Memorandum in Support of Appeal at 11-12, and further acknowledges that 40 CFR § 22.27 authorizes the Administrative Law Judge to issue a proposed final order. Nevertheless it contends that the Administrator's power to direct com-

pliance is an executive rather than an adjudicative power, and that Section 22.27 refers only to a declaratory order rather than a compliance order. In light of the express link between adjudications and compliance orders in 40 CFR §22.01(a)(4), I cannot agree with the Region.

Conclusion.

For the reasons stated herein, the order of the presiding officer is affirmed as it applies to the individual respondents George and Terry Drexler and the corporate respondents named in the Complaint. The order respecting the facility at 1930 C Street shall apply to Ronald Inman and Richard Cragle who shall be jointly and severally liable with the other named respondents as provided in the Proposed Compliance Order.

So ordered.

Alice P. Wegman for
Ronald L. McCallum
Chief Judicial Officer

Dated: MAY 19 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Reversing and Remanding Initial Decision in the matter of Arrcom, Inc., Drexler Enterprises, Inc., et al., RCRA (3008) Appeal No. 86-6, were sent to the following individuals in the manner indicated:

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Eileen J. Barnhardt

Eileen J. Barnhardt
Secretary to the Chief
Judicial Officer

Dated: MAY 19 1986